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NO. 1201

IN THE

Supreme Court of the United States

October Term, 1968

FRED G. HAYDEN, d/b/a HOUSTON INTERNATIONAL AIRPORT LIMOUSINE SERVICE, *Petitioner*

v.

A. G. BOWEN, ET AL, *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

I.

QUESTIONS PRESENTED

Where the employees of an airport limousine service, whose essential nature was the transportation of airline passengers in coordination with interstate flight schedules, pursuant to the requirements of a franchise, engaged "in commerce" for purposes of the Fair Labor Standards Act.

II.

STATEMENT OF THE CASE

Due to its inclusion of facts rejected by the courts below and its omission of a number of controlling facts, Respondents rely upon the Statement of the Case set out in detail in both the District Court and the Court of Appeals Opinions.

III.

REASONS FOR DENYING THE WRIT

(A.) The Decision Below Is In Accord With The Decisions Of This Court.

After reviewing the nature of the Petitioner's airport limousine service and finding the essential nature of Petitioner's business was to provide an integrated service with airlines which move passengers into and out of interstate flights, the Court of Appeals correctly decided that the instant case was governed by *United States v. Capital Transit Co.*, 325 U.S. 357 (1945). In the second *Capital Transit* case, *United States v. Capital Transit Co.*, 338 U.S. 286, 290 (1949), this Court held that its decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) did not conflict with its prior holding that Capital Transit's transportation was a part of a continuous stream of interstate transportation. The second *Capital Transit* case, supra, held that Capital Transit's sale of its bus line in Virginia did not affect the fact that Capital Transit's intra-district streetcar and bus transportation of passengers going to and from the Virginia destination was an integral part of an interstate movement. The fact that part of an interstate journey of persons moving from a point of origin

in one state to a point of destination in another consists of transportation by an independent agency solely within the bounds of one state does not make that portion of the trip intrastate.

The Court of Appeals properly characterized the operation of the taxicabs in *Yellow Cab,* supra, as being only incidental to the transportation of interstate passengers since the transportation of the railroad passengers by Yellow Cab was intermingled with the admittedly local operations of the Chicago taxicabs. In fact, by ordinance the Chicago taxicab service was confined to transportation between any two points within the corporate limits of the city, and none of them served only railroad passengers, all of them being required to serve every person within the limits of Chicago. Contrast this to Petitioner's operation where his service was restricted between the Houston International Airport and points designated by the City Aviation Director and confined by franchise to transporting only airline passengers arriving at or departing from the Houston International Airport. As the Court of Appeals decision points out, it was the air travel, predominantly interstate into and out of the Houston International Airport, which was the very lifeblood of the limousine service and, with few exceptions, the exclusive source of its patronage. This Court went to great lengths to point out the limited holding it intended in *Yellow Cab*:

> "All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation." 332 U.S. at p. 231.

Moreover, the operation of a taxicab servicing railroad passengers is not analogous to the service of an airline limousine servicing airline passengers. An airport serving a densely populated area, such as the Houston International Airport, by necessity will be located some distance from the downtown area. The lower courts found that the Houston International Airport was located eleven miles from the downtown Houston area where Petitioner serviced various pickup points. (R. 406, 404 Fed.2d at 683). In contrast, both railroad stations serving the City of Houston are located in the downtown area. The commonly accepted sense of the transportation concept may well dictate that an interstate railroad passenger begins his interstate journey when he arrives at the railroad station located in the downtown area, but that the interstate journey of an airline passenger begins at the time he boards a limousine which coordinates with airline schedules. Such was the reasoning of the Fourth Circuit in *Airlines Transportation, Inc. v. Tobin,* 193 F.2d 249, 251 (4th Cir. 1952).

(B.) The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals Nor Is There A Conflict Among The Other Courts Of Appeals On The Issue Of Coverage Under The Fair Labor Standards Act.

The definition of "commerce" in Section 3(b) of the Fair Labor Standards Act is to be given meaning by practical considerations, not by technical conceptions. The test is whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of it. *Mitchell v. Vollmer,* 349 U.S. 427 (1954); *Mitchell v.*

Empire Gas Engineering Co., 256 F.2d 781 (5th Cir. 1958).

This being so, Petitioner's claim that this case involves a conflict between the circuits will be seen to be really a claim that largely factual determinations were decided below in a somewhat different manner than the decisions in other cases. However, the opinion of the Court of Appeals plainly and persuasively identifies the essential factual differences between this case and some of the others relied upon.

The Court of Appeals found that the facts in this case were not significantly different from those upon which the Fourth Circuit based its findings in *Airlines Transportation, Inc. v. Tobin,* supra, and further found that important dissimilarities existed between the facts in this case and the facts of *Mateo v. Auto Rental Co.*, 240 F.2d 831 (9th Cir. 1957).

Mateo, supra, correctly held that the issue of coverage under the Fair Labor Standards Act is a factual one and the decision must rest on the particular facts of each case. 240 F.2d at 833.

(C.) The Issue Presented Is Not Of Public Importance.

The period of time for which minimum wages and overtime were sought in the instant case covered the period from June 20, 1961 to February 12, 1965. In 1966 coverage under the Fair Labor Standard Act was expanded to include coverage of employees employed in an enterprise engaged in commerce or the production of goods for commerce. 29 U.S.C.A. 203s; 29 U.S.C.A. 206 and 207.

A worker employed by an enterprise covered by the Fair Labor Standards Act comes within the purview of the statute regardless of whether his particular activities have any relation to interstate or foreign commerce. He is entitled to all the statutory benefits merely because of the covered status of his employer. As of February 1, 1969, an enterprise engaged in commerce is an enterprise whose annual gross volume of sales made or business done is not less than $250,000.00. 29 U.S.C.A. 203. Even during the covered period, Petitioner exceeded this gross amount since he transported over 200,000 passengers to and from the airport, charging *$1.50* for each trip. (Memorandum Opinion of the District Court, R. 409; R. 429).

It is respectfully submitted that the issue here presented is moot for most airport limousine services serving a metropolitan airport since they will have gross revenues in excess of $250,000.00.

In addition to transporting airline passengers to and from the Houston International Airport, Petitioner also, on a regular and recurrent basis, hauled interstate airline mail, hauled airline flight crews to and from the airport by special arrangements with interstate carriers, handled baggage of interstate passengers, and hauled interstate passengers whose interstate trips had been interrupted at the Houston International Airport to points outside the City of Houston (Memorandum Opinion of the District Court, R. 406-408). The involvement of Petitioner's employees in these activities now clearly brings him within the purview of the Fair Labor Standards Act under the enterprise coverage test, if he was not otherwise covered.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari to review the judgment of the court below should be denied.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned counsel for Respondents, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing petition has been served upon Petitioner by personally delivering a copy thereof to Robert L. Burns, attorney of record for Petitioner, 1811 C & I Building, Houston, Texas, on this _____ day of May, 1969.

_____
Chris Dixie